

April 15, 2003

Water Docket  
Attn: Docket ID No. OW-2002-0050  
U.S. Environmental Protection Agency  
Mailcode 4101T  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

RE: Advanced Notice of Proposed Rule Making and Potential Revisions to  
Clean Water Act Jurisdiction  
Docket ID No. OW-2002-0050

Dear Mr. Mehan:

Please accept the following comments from the State of New Jersey concerning the Advance Notice of Proposed Rulemaking on the Definition of 'Waters of the United States' published by the U.S. Environmental Protection Agency (USEPA) and Department of Defense, Army Corps of Engineers (ACOE) in the January 15, 2003 Federal Register. We welcome the opportunity to comment on this important issue.

New Jersey strongly supports the purpose of the Clean Water Act (Act), to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." Therefore, we strongly recommend that USEPA and the ACOE adopt an appropriately narrow interpretation of the *Solid Waste Agency of Northern Cook County v. U. S. Army Corps of Engineers (SWANCC)* decision that will not weaken the Act or in any way undermine the ability to achieve its purpose. The *SWANCC* decision rested on a unique set of facts that does not merit a retreat from Federal jurisdiction beyond the specific provision of the Migratory Bird rule that the Supreme Court struck down. Failure to exercise broad jurisdiction under the Clean Water Act will result in substantial losses to the quality and quantity of the nation's water resources, including valuable wetlands.

New Jersey is unique in that it is one of two states in the nation that have assumed jurisdiction of the Federal 404 program through the adoption and implementation of the New Jersey Freshwater Wetland Protection Act (FWPA). In doing so, New Jersey acknowledged the importance of all wetlands and reaffirmed its commitment to the protection of the State's water resources. It is essential that the Federal government also maintain its commitment to the nation's waters by regulating all wetlands that are necessary to achieve the purpose of the Clean Water Act.

It is common knowledge that wetlands provide protection from flooding, serve as important habitat and refuge for wildlife, act as areas for recharge of groundwater, and improve water quality, among many other functions and values. The types of isolated wetlands that are not “navigable in fact” and which are the subject of this solicitation for comments are especially critical. Such wetlands provide essential breeding and feeding habitat for several State threatened and endangered species such as the blue-spotted salamander, long-tailed salamander, eastern tiger salamander, pine barrens tree frog, and the southern gray tree frog. They are also known habitat for the bog turtle; a Federally listed species with occurrences in New Jersey. In addition, isolated and non-navigable wetlands provide critical flood storage during storm events thereby reducing the threat to property and life. They also serve as areas for groundwater recharge and contaminant removal, both of which are necessary to maintain water quality and quantity.

Wetlands, like most natural resources, are not confined to political boundaries. Thus, the destruction of wetlands and waters outside of New Jersey that will result if the *SWANCC* decision is interpreted overbroadly will inevitably affect our State. Possible negative impacts include: the degradation of surface and ground waters which serve as a drinking water supply for New Jersey and adjacent states, increased flooding, the disturbance of nursery habitat for commercial fisheries and the destruction of interstate or migratory wildlife habitat and populations. For example, the state of New York does not regulate inland wetland areas that are smaller than 12.4 acres. Federal government therefore plays an essential role in the protection of these areas and consequently the water resources that they affect within New Jersey.

Wildlife populations that rely on non-navigable and isolated wetlands are also unconstrained by political boundaries and will therefore be affected by exclusion from regulation. The loss of jurisdiction of these important wetlands throughout the nation may result in a decline in the populations of migratory birds that breed, seasonally reside or rest within New Jersey. Birding and hunting is an important part of New Jersey’s economy that would be negatively affected by such a change.

Thus, while New Jersey values isolated and non-navigable wetlands within its own borders and has legal restrictions in place to protect them, it is essential to the health of the water resources throughout the nation that the Federal government also recognize the importance of these areas by protecting them within every state. The Federal government’s constitutional role is to regulate in areas where states alone can not achieve desired ends for the good of the public and the environment. Regulation of waters of the United States is one such area requiring the Federal government to take an active role.

NJDEP suggests that the definition of the “Waters of the United States” should be clarified to ensure the comprehensive regulation of all wetlands/waters that are necessary to “restore and maintain chemical, physical, and biological integrity of the Nation’s

Waters”. The waters and wetlands necessary to achieve this goal include isolated wetlands and those that are not “navigable-in-fact.” The exclusion of these wetlands and waters from jurisdiction will result in a failure to fully realize this goal. Therefore, while it is our belief that these areas are included in the current definition, the definition should be clarified to prevent an erroneous interpretation that could result in the inability to regulate critical water resources that are essential to restore and maintain the nation’s waters.

Furthermore, it should be noted that the *SWANCC* ruling pertained to a 404-program action and should not be applied to other Federal programs. USEPA should interpret *SWANCC* narrowly and clarify that *SWANCC* did not invalidate any of the regulatory provisions defining “waters of the United States.” Rather, it invalidated only Clean Water Act jurisdiction over isolated, non-navigable waters on the basis of certain factors listed in the “Migratory Bird Rule,” which was, in fact, not a rule but a policy and guidance document. The *SWANCC* decision should not be extended to remove all isolated and non-navigable wetlands from Federal jurisdiction. Any use of the *SWANCC* decision to amend the definition of “waters of the United States” to exclude critical water resources will inappropriately reach far beyond the scope of the decision and will conflict with the purpose of the Clean Water Act to “restore and maintain chemical, physical, and biological integrity of the Nation’s Waters.” Such a change would result in a nationwide degradation of waters and vital habitat and is strongly opposed by New Jersey.

Sincerely,

Bradley M. Campbell  
Commissioner